FILE COPY

No. 187

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

SILVER KING COALITION MINES COMPANY, a Corporation,
Appellee,

v.

CONKLING MINING COMPANY,
a Corporation,
Appellant.

Motion to Dismiss Appeal and Brief.

EDWARD B. CRITCHLOW,
WM. W. RAY,
WM. D. McHUGH,
WM. H. KING,
Solicitors for Appellee.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

SILVER KING COALITION MINES COMPANY, a Corporation,
Appellant,
v.
CONKLING MINING COMPANY, a Corporation,
Appellee.

MOTION TO DISMISS APPEAL.

Now comes Conkling Mining Company, the appellee above named, and moves the Court to dismiss the appeal herein, for the reason and upon the ground that as appears by the record, this Court has no jurisdiction to entertain the same, it manifestly appearing that the judgment and decree of the Circuit Court of Appeals of the Eighth Circuit from which said appeal is taken was and is final.

This motion is made upon the record on file herein.

EDWARD B. CRITCHLOW,
WM. W. RAY,
WM. D. McHUGH,
WM. H. KING.

IN THE

Supreme Court of the United States.

SILVER KING COALITION MINES COMPANY, a Corporation,
Appellee,

v.

CONKLING MINING COMPANY, a Corporation,
Appellant.

BRIEF OF ARGUMENT ON MOTION TO DISMISS APPEAL.

The record in this cause discloses that this suit was brought originally in the U. S. District Court for the District of Utah. The Amended Complaint of plaintiff was filed therein on the 5th day of July, 1909. It discloses in paragraph I, that the plaintiff is a corporation organized and existing under the laws of the State of Utah, and in paragraph II, that the defendant is a corporation organized under the laws of the State of Nevada. These allegations being admitted by the answer of the defendant, it is apparent that the jurisdiction of the District Court depends entirely upon the diverse citizenship of the parties.

THE COMPLAINT.

The cause of action set forth in the complaint depends upon the ownership by the plaintiff (paragraphs III and IV) of an undivided three-fourths interest and by the defendant of an undivided one-fourth interest in two certain Lode Mining Claims, The Conkling Lode Claim, U. S. Lot No. 689, and the Arthur Lode Claim, U. S. Lot No. 690, and of the ore body beneath the surface of the same (paragraph V).

It is further alleged (paragraphs VII and VIII), that the defendant has mined and removed from beneath said claims, and has appropriated to its own use large quantities of ore of a value exceeding $1,000,000.00.

It is further stated (paragraph X), that the defendant sets up and pretends to own an exclusive interest, not as tenant in common with plaintiff, in the southwest 135.5 feet of the said Conkling Lode Mining Claim, which parcel is described by metes and bounds, but that said pretenses and claims of the defendant are unfounded in fact.

It is further alleged (paragraph XI), that certain workings were secretly extended by the defendant beneath the surface of the said mining claims so held as tenants in common, and (paragrph XII), that the principal part of the ores extracted and appropriated came from within the boundaries of the 135.5 feet so wrongfully claimed by the defendant as sole owner.

It is alleged (paragraphs XIII and XIV), that a predecessor in interest of the defendant attempted to purchase the interest of plaintiff in the said claims, and that

failing so to do, purchased from the Belmont Mining Company certain adjoining mining claims owned by it which were granted by a patent of the United States of later date than the patents of the Conkling and Arthur claims, but which, according to the descriptions by metes and bounds, overlapped the last named claims, including within said overlap the greater part of the 135.5 feet of the Conkling claim.

That prior to said purchase of the claims of the Belmont Mining Company, neither the defendant nor its grantors held or claimed any interest in any part of the 135.5 feet of the Conkling Claim or in any part of the Conkling Claim save as tenant in common with the plaintiff. That the purchase of the claims of the Belmont Mining Company was secretly made by the defendant's grantor, after the discovery of the body of ore, the greater part of which lies beneath the 135.5 feet. That after the development of said ore body and after the secret purchase as aforesaid the defendant's grantor and predecessor in interest secured title to the claims of the Belmont Mining Company, while holding all of the said Conkling Claim as tenants in common with the predecessors in interest of the plaintiff, and after said purchase made no independent or adverse claim to any part of the said claim until about April 11, 1908.

That pursuant to an order of Court permitting an entry into the underground workings, the plaintiff's grantors, in June, 1908, were able to and did ascertain the facts as to the said workings and the extent of the ore body and the importance of the Conkling Claim.

It is further alleged (paragraph XVI), that while the defendant and its grantors were respectively tenants in common with the predecessors in interest of plaintiff, and after the discovery of the ore body, the defendant endeavored to purchase the three-fourths interest from plaintiff's grantors for a trifling sum.

The complaint further alleges (paragraph XVII), that the claims overlapping the Conkling Claim were, as aforesaid, purchased without the knowledge, acquiescence or consent of the grantors of plaintiff and for the purpose of defrauding them out of their just rights in the Conkling and the ore body therein, and that the attempt to describe and locate the Conkling Claim so as to exclude the 135.5 feet, was with a like intent. That neither of the grantors of plaintiff were notified by the grantors and predecessors of the defendant of the purchase of said Belmont Claims as in duty bound they should have given notice, nor was plaintiff or its grantors given an opportunity to participate in said purchase although it was ready and willing to contribute to the purchase price. Plaintiff offers to pay such sum as is equitable toward such purchase, which as made, has greatly prejudiced the plaintiff.

It is further stated (paragraph XVIII), that the survey of the Conkling Claim was made in 1889 by a Deputy Mineral Surveyor, now deceased, and that all other persons connected with the survey of the claim are either dead or their whereabouts unknown; that the Conkling is situate in rough country at a high altitude, that the surface is covered in part with trees, brush and undergrowth,

that the annual snow fall is very great, that none of the original marks or boundaries referred to in the U. S. patent are now standing and that the original place where the respective corners were marked, if marked at all, is a matter of speculation. That the defendant has upwards of forty miles of underground workings and thereby was able to secretly explore and determine the strike and dip of mineral bearing veins including the territory of the Conkling Claim, and since the discovery of the ore bodies within said claim, has been secretly scheming to secure to the defendant exclusively the 135.5 feet of the Conkling Claim without informing the plaintiff or its grantors of its secret acts, doings or intentions, thereby leaving the plaintiff at this late date entirely helpless to meet the contentions of defendant in reference to the boundaries of the Conkling Claim being other than as described in the U. S. patent.

It is alleged (in paragraph XIX), that it was and is the duty of the defendant and its predecessors in interest in the Conkling Claim to protect the entire extent and area of said claim, as described in the patent and secure, if possible, the entire area thereof, and not to destroy or defeat the same in any manner or to attempt to acquire any adverse interests in or to the ground as bounded or described in the patent, or in or to the minerals therein contained within vertical planes bounding the Conkling and Arthur Claims as described in the patent. That neither the United States nor any other party not interested in the Conkling Claim does now or ever has dis-

puted the exterior boundaries of the said claim as described in the U. S. patent.

The prayer of the complaint is that the defendant make full disclosure and full, true and perfect answer to all the matters set forth, but not under oath; that defendant be required to set forth any and every adverse interest, claim or demand in and to the described premises to the end that the same be adjudicated to be null and void, excepting as to an undivided one-fourth interest as tenant in common with plaintiff; that an accounting be taken as to the quantity and value of the ores and minerals removed by the defendant from the described premises and that plaintiff be decreed to be the owner of three-fourths thereof and defendant required to pay the same to plaintiff; that an injunction be granted or in lieu thereof that a receiver be appointed pending the final determination of the action; that the defendant be decreed to have purchased and to hold the claims acquired from the Belmont Mining Company in trust for the plaintiff to the extent of a three-fourths interest; that plaintiff have such other and further relief as to equity belongs.

From the foregoing it is apparent that the action, founded as aforesaid on diverse citizenship, was for the quieting of title, to the extent of its three-fourths interest, in the Conkling and Arthur Lode Mining Claims, and particularly in the 135.5 foot parcel at the westerly end thereof, and further the enforcement in favor of the plaintiff of an equity in the claims purchased from the Belmont Mining Company, founded as claimed upon the

duty resting upon the defendant and its grantors as tenants in common of the plaintiff and its grantors, and lastly, the accounting as to ores taken from the premises.

ARGUMENT UPON THE MOTION.

From the foregoing it appears that the plaintiff, although holding with the defendant as tenant in common under a patent of the United States, does not tender a dispute or controversy as to the effect or construction of the Constitution or of any law or treaty of the United States. The jurisdiction of the U. S. District Court was invoked solely upon the ground of diverse citizenship and not upon the ground that the suit arose under Constitution law or treaty.

The decision of the Circuit Court of Appeals was therefore final, and the appeal to this Court should be dismissed.

Bonin v. Gulf Company, 198 U. S. 115;
Colorado Central Consolidated Mining Company v. Turck, 150 U. S. 138;
Shulthis v. McDougal, 225 U. S. 561-570.

The statement in the complaint that defendant and its predecessors in interest had purchased and were holding adversely to the equitable rights of the plaintiff as tenant in common certain mining claims, the patent to which is junior to the patent under which both plaintiff and defendant hold, does not state a cause of action involving the construction of a law of the United States, and if it did, it still would not invoke the jurisdiction of

the District Court, in such manner as to render the cause appealable to this Court.

Taylor v. Anderson, 234 U. S. 74;
Joy v. St. Louis, 201 U. S. 332.

Respectfully submitted,

EDWARD B. CRITCHLOW,
WM. W. RAY,
WM. D. McHUGH,
WM. H. KING,
Solicitors for Appellee.

To Wm. C. Prentice, Adrian C. Ellis, Jr., and Thomas Marioneaux, Solicitors for Appellant:

Please take notice that the foregoing motion to dismiss Appeal will be submitted to the United States Supreme Court, at the Court Room, Washington, D. C., on Monday, the 29th day of November, 1920, at the opening of Court on said day, or as soon thereafter as counsel can be heard.

EDWARD B. CRITCHLOW,
WM. W. RAY,
WM. D. McHUGH,
WM. H. KING,
Solicitors for Appellee.

Copy of the foregoing motion and notice and brief in support thereof served on us this 26th day of October, 1920.

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Solicitors for Appellant.